J.H. RAYNER (MINCING LANE) LTD. & ORS. v. MANILAL & SONS (M) SDN. BHD. & ANOR.

[O.C.J. (Zakaria Yatim J.) February 28, 1986]

[Kuala Lumpur – Civil Suit No. C22-7 of 1986]

Practice and Procedure – Injunction – Application to dissolve injunction granted – Duplicity of proceedings – Whether to lift the corporate veil.

The plaintiffs were foreign companies carrying on business in London and New York. The two defendants were companies incorporated in Malaysia and carrying on business in Malaysia. The plaintiffs claimed that the defendants were indebted to them in the sum of $10,448,139.00 plus a further sum of more than £748,719 if the price of tin is valued below £6,500 per metric ton. On November 25, 1985, the first defendant company wrote a letter to the first plaintiff admitting the debt. On the same date, the first defendant wrote to the first plaintiff asking the latter not to commence legal proceedings against it for a period of twenty-one days from the date of the letter. The letter further stated that within the said period of twenty-one days, the first defendant would pledge in favour of the plaintiffs all the issued shared capital of its subsidiary company, namely, the second defendant. In addition the first defendant would precure the creation of a first legal fixed and floating charge over all the assets of the second defendant in favour of the plaintiffs as security for the payment of the said debt. The defendants failed to comply with their undertaking.

The plaintiffs commenced an action in London against the first defendant and its associate companies and obtained a Mareva order restraining them from dissipating their assets up to maximum limit of £3,700,000.00. On January 11, 1986, the plaintiffs filed a writ here against the defendants and obtained an injunction. The injunction restrained the first defendant from disposing of or creating any charges, liens, pledge or any other encumbrances over the issued and paid-up capital of the second defendant. It also restrained the second defendant disposing of or creating any charges, liens, pledge or any other encumbrances over all the assets of the second defendant both movable and immovable.

In the present case, the two defendants applied for an order of court dissolving the injunction granted against them.

Held: (1) the present proceedings before this court were an abuse of the process of the court and should be stayed, and the injunction ordered against the first defendant be dissolved;

(2) the plaintiffs' undertaking, as to damages, could not be enforced as they had no assets within jurisdiction. All the plaintiffs were foreign companies resident abroad. If the plaintiffs did not succeed at the trial, the first defendant would suffer damages which the plaintiffs could not compensate. The balance of convenience should be decided in favour of the first defendant;

(3) the court will only lift the corporate veil of a company if the justice of the case so demands. In the instant case there was no justification for the court to lift the corporate veil of the second defendant. (The present case was distinguished from *Jones* v. *Lipman*[4]);

(4) since the second defendant was a separate entity from the first defendant, the undertaking given by the first defendant did not bind the second defendant. The plaintiffs had, therefore, no cause of action against the second defendant. The injunction granted against the second defendant must be dissolved.

Cases referred to:

(1) *Mosbert Acceptance Ltd. & Anor.* v. *Liew Choon Kee & Anor.* [1983] 1 M.L.J. 62.
(2) *Lim Eng Kay* v. *Jaafar bin Mohamed Said* [1982] 2 M.L.J. 156.
(3) *Elliott* v. *Pierson* [1948] 1 All E.R. 939.
(4) *Jones & Anor.* v. *Lipman & Anor.* [1962] 1 All E.R. 442.
(5) *Bank Bumiputra Malaysia Bhd. & Anor.* v. *Lorrain Osman & Ors.* [1985] 2 M.L.J. 236.
(6) *Hotel Jaya Puri Bhd.* v. *National Union of Hotel, Bar and Restaurant Workers & Anor.* [1980] 1 M.L.J. 109.

CIVIL SUIT.

N. Chandran for applicant/first defendant.

Anad Krishnan for applicant/second defendant.

Y.M. Raja Abdul Aziz Addruse (*V.M.S.V. Radha* with him) for the plaintiff.

Cur. Adv. Vult.

Zakaria Yatim J. : There are two applications before this court. In both these applications, the two defendants are seeking the order of the court – (1) to dissolve an injunction granted against them on January 13, 1986; (2) that an enquiry as to damages suffered by them as a result of the injunction be directed; and (3) costs of the applications. The second defendant asks for an alternative order *viz*; that the injunction be varied so as to permit the second defendant to carry on or conduct its activities in the ordinary course of business upon such terms and conditions as the court deems just.

The injunction granted by the court on January 13, was in the following terms:-

"(a) the First Defendant, Manilal & Sons (M) Sdn. Bhd. by their agents or servants or otherwise be restrained and an Injunction is hereby granted restraining them from disposing of or creating any charges, liens, pledge or any other encumbrances over the issued and paid-up capital of the Second Defendant; and

(b) the Second Defendant, Vegetable Oils Industries Bhd. by their agents or servants or otherwise be restrained and an Injunction is hereby granted restraining them

from disposing of or creating any charges, liens, pledge or any other encumbrances over all the assets of the Second Defendant both movable and immovable."

The plaintiffs are foreign companies carrying on business in London and New York. The two defendants are companies incorporated in Malaysia and carrying on business in Malaysia.

The plaintiffs claim that the defendants are indebted to them in the sum of $10,448,139.00 plus a further sum of more than £748,719 if the price of tin is valued below £6,500 per metric ton. On November 25, 1985, the first defendant company wrote a letter to the first plaintiff admitting the debt. On the same date, the first defendant wrote another letter to the first plaintiff asking the latter not to commence legal proceedings against it for a period of twenty-one days from the date of the letter. The letter further stated that within the said period of twenty-one days, the first defendant would pledge in favour of the plaintiffs all the issued share capital of its subsidiary company namely the second defendant. In addition, the first defendant would procure the creation of a first legal fixed and floating charge over all the assets of the second defendant in favour of the plaintiffs as security for the payment of the said debt. One of the signatories to the said letter was R.D. Patel who was a director of the first and second defendant companies. The defendants, however, failed to comply with the undertaking contained in the second letter. The plaintiffs commenced an action in London against the first defendant and its associate companies and obtained a Mareva order restraining them from dissipating their assets up to a maximum limit of £3,700,000. On January 11, 1986, the plaintiffs filed a writ here against the defendants and subsequently obtained the order in terms stated above.

I shall now deal with the application of the first defendant. Mr. N. Chandran, counsel for the first defendant argued that since the plaintiffs had instituted similar proceedings against the first defendant in London, the present proceedings in Kuala Lumpur are a duplicity of the London proceedings and should be stayed. The plaintiffs, he added, cannot maintain the present action here, and accordingly the injunction cannot be allowed to stand.

In my judgment, the present proceedings before this court are an abuse of the process of the court and should be stayed, and the injunction ordered against the first defendant be dissolved. Both the London proceedings and the Kuala Lumpur proceedings are substantially the same. In both proceedings, the plaintiffs are claiming the same amount of money based on the same letters of undertaking dated November 25, 1985.

In *Mosbert Acceptance Ltd. & Anor.* v. *Liew Choon Kee & Anor.*,[1] Rajah J. said,

"It therefore appears to me that, as the plaintiffs cannot be allowed to run their claim for US$350,000/- *in tandem* both in California and in Singapore, clearly the Singapore action must be stayed.

What I propose to do is to order a stay of the proceedings in Singapore until the action run in California *has been litigated to a finish* in the American Courts..."

In my view, the passage above applies in the present case. Although in *Mosbert's* case, the court in California had given judgment, the plaintiffs' appeal against that decision was still pending. The situation in the present case is quite similar to that in *Mosbert's* case.

Y.M. Raja Abdul Aziz, counsel for the plaintiffs, submitted that the first defendant's application did not contain a prayer for stay of proceedings and the court should not consider the question of stay. Mr. N. Chandran, referred to prayer 4 in his application, *viz.*, "such further or other orders or directions be made or given as this Honourable Court deems fit." In his submission, he formally asked the court to grant the stay under prayer 4. I think prayer 4 is wide enough to enable the court to grant the stay. In *Lim Eng Kay* v. *Jaafar bin Mohamed Said*,[2] Salleh Abas F.J., as he then was, in delivering the judgment of the Federal Court said, at page 160:-

"We cannot see how the respondent should be deprived of his right by a purely technical error on the part of his solicitors...In any case prayer (e) in paragraph (7), 'Any other relief which this Honourable Court deem fit to grant' must not be treated as a mere ornament to pleadings devoid of any meaning. We think that this prayer and the prayer for 'loss of earning' in paragraph 5(a) should entitle the court to make such an assessment..."

Apart from duplicity of proceedings, the first defendant should succeed in his application on the ground that the plaintiffs' undertaking, as to damages, cannot be enforced as they have no assets within jurisdiction. All the plaintiffs are foreign companies resident abroad. The plaintiffs, in their affidavit affirmed on February 4, 1986, admitted that they "do not have any assets within the jurisdiction of this court." If the plaintiffs do not succeed at the trial, the first defendant will suffer damages which the plaintiffs cannot compensate.

Furthermore, I find that the balance of convenience should be decided in favour of the first defendant.

I shall next deal with the second defendant's application.

Mr. Anad Krishnan, counsel for the second defendant submitted that the plaintiffs have no cause of action against the second defendant as there is no privity of contract between the plaintiffs and the second defendant. According to him, the plaintiffs' claim against the second defendant is entirely based on the letters written by the first defendant to the first plaintiff on November 25, 1985.

The letters were signed by three persons one of whom was Mr. R.D. Patel. Mr. R.D. Patel is the director of the first defendant as well as the second defendant. It is clear from the letters of November 25, when Mr. R.D. Patel signed the letters, he signed them as director of the first defendant. When the first defendant pledged "all the issued share capital" of the second defendant, it was an arrangement between the first defendant and the first plaintiff. Although the first defendant owns about 60% of the issued and paid up capital of the second defendant, the second defendant remains a separate entity from the first defendant. Whatever undertaking given by the first defendant in the two letters, such undertaking did not bind the second defendant.

Y.M. Raja Abdul Aziz submitted that all the shares in the second defendant are owned by the first defendant and by another company Maniyus Holdings Sdn. Bhd. which, according to him, is controlled by the first defendant. He seems to suggest that in view of this, the second defendant is bound to comply with the undertaking. He cited *Elliott* v. *Pierson*[3] and *Jones & Anor.* v. *Lipman & Anor.*[4] in support of his argument.

It seems to me that Y.M. Raja Abdul Aziz was asking the court to lift the corporate veil of the second defendant. In *Bank Bumiputra Malaysia Bhd. & Anor.* v. *Lorrain Osman and Ors.*,[5] I had occasion to consider *Jones* v. *Lipman, supra,* and at page 244, I said,

"In *Jones & Anor.* v. *Lipman & Anor,*[16] the first defendant agreed to sell freehold land with registered title to the plaintiffs for £5,250. Pending completion he sold and transferred the land to the defendant company of which he and a clerk for his solicitors were shareholders and directors for £3,000, of which £1,564 was borrowed by the defendant company from a bank and the rest remained owing to the first defendant. The court held that the defendant company was a cloak for the first defendant, who could compel a transfer of the land to the plaintiffs, and they could decree specific performance against both defendants. Russell J. in his judgment said,

'The defendant company is the creature of the defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity...an equitable remedy is rightly to be granted directly against the creature in such circumstances.' "

In the present case, the situation is different from that in *Jones* v. *Lipman*. From the evidence available, the first defendant does not fully own all the shares in the second defendant. In *Lorrain's* case, I refused to lift the corporate veil in respect of five companies which were not fully owned by Lorrain. See *Lorrain's case supra*, page 247. The court will only lift the corporate veil of a company if the justice of the case so demands. See *Hotel Jaya Puri Bhd.* v. *National Union of Hotel, Bar and Restaurant Workers & Anor.*[6] and *Lorrain's* case, *supra*, at page 245. In the instant case there is no justification for the court to lift the corporate veil of the second defendant.

Since the second defendant is a separate entity from the first defendant, the undertaking given by the first defendant does not bind the second defendant. The plaintiffs have, therefore, no cause of action against the second defendant, and accordingly there is no serious question to be tried. In the circumstances, the injunction granted against the second defendant must be dissolved.

For the reasons stated above, I make the following order:-

(1) The injunction granted on January 13, 1986 against the first and second defendants *must* be dissolved forthwith.

(2) An enquiry as to damages suffered by both the defendants by reason of the injunction will be held by the Registrar on a date to be fixed.

(3) The plaintiffs will pay the costs of these two applications to both the defendants.

Order accordingly.

Solicitors: *Adnan, Sundra & Low; James Fong & Anad; Rashid & Lee.*